

No. 18831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ALEXANDER T. CHOHOH,

Bankrupt.

APPELLEE'S BRIEF.

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Statement of the Case.

Appellee, bankrupt herein, concurs in the Statement of the Case presented by appellant in his opening brief, but desires to add the following two facts thereto: The grant deeds referred to dated November 29 and November 30, 1956, were recorded on the dates which they bore, and thereafter legal title to the home property has remained and still remains vested in Title Insurance and Trust Company. On December 22, 1960, in the Schedules filed by bankrupt, he claimed a homestead exemption on the home property.

Summary of Argument.

1. Section 70a of the Bankruptcy Act vests the trustee with title only to bankrupt's non-exempt property, and is not determinative of the time and manner of claiming such exemptions.

2. In order to ascertain whether property is exempt, analysis must be made of the applicable State laws dealing with exemptions.

3. Appellee's declaration of homestead which, in the absence of bankruptcy, would have prevailed in California against any lien creditor at the time of its filing, will prevail against the trustee.

1. **Section 70a of the Bankruptcy Act Vests the Trustee With Title Only to Bankrupt's Non-Exempt Property, and Is Not Determinative of the Time and Manner of Claiming Such Exemptions.**

Section 70a of the Bankruptcy Act (11 U. S. C. § 110) provides in part as follows:

"The trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date of filing of the petition initiating a proceeding under this act *except insofar as it is to property which is held to be exempt* . . . (Emphasis added.)

The trustee contends that Section 70a is controlling herein, asking "how could the bankrupt possibly acquire a homestead upon an interest in property which had months before passed to his trustee in bankruptcy?" (A. O. B. p. 6.) He argues, in essence, that under Section 70a, he became vested with all of the property of the bankrupt as of the date of the filing

of the petition in bankruptcy, and the bankrupt could not thereafter claim an exemption in the home property. This cannot be a correct statement of the law, as a simple illustration will show:

California Code of Civil Procedure Sections 690.1-690.25, inclusive, afford to claimants thereof a number of exemptions, frequently calling for selection of certain items from among a class of similar items. If the trustee's argument were correct, it would be impossible for any bankrupt against whom an involuntary petition has been filed to make the necessary claim and selection provided by those sections, since the trustee would have become vested with the bankrupt's interest in all the properties of the bankrupt, whether or not described therein, and all claims of exemption, which are not made until the bankrupt files his Schedule, would be cut off.

This is not the meaning of Section 70a. That section applies only to non-exempt property, and does not deal with the time or manner of claiming exemptions.

Brandt v. Mayhew, 218 Fed. 422 (1914).

Under the 1938 Amendment to Section 70a (changing from "except insofar as it is to property which is exempt," to "property which is held to be exempt") "a homestead is exempt if, under the State law, it would be held to be exempt."

Myers v. Matley, 318 U. S. 622, 63 S. Ct. 780 (1943).

2. In Order to Ascertain Whether Property Is Exempt, Analysis Must Be Made of the Applicable State Laws Dealing With Exemptions.

In support of his position, appellee herein will cite three landmark cases in the area of homestead exemptions, *White v. Stump*, 266 U. S. 310, 45 S. Ct. 103 (1924), *Myers v. Matley*, *supra*, and *Sampsel v. Straub*, 194 F. 2d 288 (9th Cir. 1952) *cert. denied* 343 U. S. 927, 72 S. Ct. 76 (1952). In each of these cases, a homestead declaration was filed after the filing of a petition in bankruptcy, and in each such case, an analysis was had of the State law pertaining to homesteads and creditors' rights in order for each of the courts involved to make its judgment. It is respectfully submitted that if the trustee were correct in his position that Section 70a answers all questions herein, none of these cases would have any meaning or significance. However, a detailed analysis of these three cases will indicate to the court the necessity of analyzing California law in order to ascertain whether the homestead herein filed is valid against the trustee.

In *White v. Stump*, *supra*, a voluntary bankruptcy was filed, and one month later, a homestead declaration recorded in accordance with Idaho law. Under the then existing law in Idaho, in the absence of bankruptcy, any creditor who had levied under an attachment or execution would prevail over a subsequently filed homestead. The court held that the exemption in Section 70a "is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under state law a present right of exemption—one which would withdraw the property from levy and sale under ju-

dicial process.” (266 U. S. at 313.) Hence, in that case, since the bankrupt’s creditors could have reached the land by levy and sale, the court held the property not to be exempt.

In *Myers v. Matley*, *supra*, the court initially distinguished the *White v. Stump* case, since under Nevada law, applicable in the *Myers* case, a homestead declaration would protect the land even after a levy had been made by a creditor, if the declaration was recorded at any time before sale.

The court stated that

“historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of an execution for the benefit of creditors to insure an equitable distribution among them of the bankrupt’s assets. The trustee is vested not only with the title of the bankrupt, but clothed with the right of an execution creditor with a levy on the property which passes into the trustee’s custody.”

Appellee herein urges the significance of the foregoing language upon the court, in that it becomes obvious therefrom that the status of the trustee under Section 70a and 70c is as one who takes the bankrupt’s title to non-exempt property. But as to property as to which a claim of exemption is made, in determining that claim of exemption, the trustee stands in the shoes of a lien creditor. If that lien creditor has no rights under applicable state law, then neither does the trustee as to the property in question, and the property is exempt.

The Court in the *Myers* case, reaching this conclusion, held that

“in conformity to the principle announced in *White v. Stump*, that the bankrupt’s right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy, and cannot thereafter be enlarged or altered by anything the bankrupt may do, it remains true that, under the law of Nevada, the right to make and record the necessary declaration of homestead existed in the bankrupt at the date of filing the petition, as it would have existed in case the levy had been made upon the property. The assertion of that right before actual sale in accordance with state law did not change the relative status of the claimant and the trustee subsequent to the filing of the Petition.” (318 U. S. at 628.)

In *Sampsel v. Straub*, *supra*, the lower courts had recognized that Section 70a was inadequate to solve the problem where the bankrupt had filed a declaration of homestead subsequent to the filing of the petition in bankruptcy. This court was required to analyze Section 70c of the Bankruptcy Act, and it is on that analysis that the *Sampsel* decision stands.

Section 70c of the Bankruptcy Act provides in part as follows:

“. . . the trustee, as to all property . . . upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all of the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.”

The *Sampsel* case turned on an analysis of California law, and the California cases which stand for the rule that a judgment creditor with abstract of judgment recorded is entitled to a lien upon all non-exempt real property to which the judgment debtor has *legal* title.

From the foregoing cases, the following general rules emerge:

Section 70a of the Bankruptcy Act does not determine in and of itself that if the bankrupt owns an interest in real property as of the date of the filing of the petition, and subsequently records a homestead thereon, every such homestead declaration is invalid.

A homestead recorded after the filing of a petition in bankruptcy will be valid and the trustee must recognize the exemption, if, under state law, a lien creditor's rights could be defeated by the filing of the homestead. That is to say, if the homestead declaration will defeat the rights of a judgment-creditor it will defeat the rights of the trustee.

3. Appellee's Declaration of Homestead Which, in the Absence of Bankruptcy, Would Have Prevailed in California Against Any Lien Creditor at the Time of Its Filing, Will Prevail Against the Trustee.

Bankrupt herein, it will be recalled, as of the date of the filing of the petition in bankruptcy, had only an *equitable* title to the real property involved, and did not have legal title. Legal title rested in Title Insurance and Trust Company.

California Code of Civil Procedure, Section 674 allows a judgment creditor to record an abstract of his judgment, which becomes a lien on the real property of the judgment debtor. However, such a judgment credi-

tor is entitled to a lien only upon real property to which the judgment debtor holds legal title. Where the judgment debtor has merely equitable title, no lien is created thereon by the recordation of an abstract of judgment.

Merchantile Collection Bureau v. Roach, 195 Cal. App. 2d 355, 15 Cal. Rptr. 710 (1961);

Homeland Building Co. v. Reynolds, 49 Cal. App. 2d 176, 121 P. 2d 59 (1942).

In *Poindexter v. Los Angeles Stone Co.*, 60 Cal. App. 686, 214 Pac. 241 (1923), a judgment creditor attempted to assert a lien of judgment against the interest of a beneficiary of a trust in real property. The court held that the lien of the judgment attaches to legal interests only, and not to equitable interests. This was true although the legal interest involved was mere formal title, the full beneficial interest being in the judgment debtor.

Thus, a California judgment creditor, with abstract of judgment recorded has a lien only upon real property wherein the judgment debtor has legal title, and his lien does not reach property to which the debtor has only equitable title. On the other hand, a declaration of homestead may be filed by a person regardless of whether he has legal or equitable interests in the real property. *Alexander v. Jackson*, 92 Cal. 514, 28 Pac. 593 (1891) holds that an equitable title is sufficient to support a homestead declaration.

Thus, where an equitable interest in real property is all that is held by the bankrupt, California law dealing with homestead declarations is exactly the same as Nevada law concerning all homestead declarations, and the decision in *Myers v. Matley*, should be controlling. Under Nevada law, as set forth in *Myers*, a declaration

of homestead filed at any time before sale will defeat the rights of a lien creditor. In California, where equitable title is all that is held, a declaration of homestead recorded before execution sale, will defeat the rights of any creditor.

The trustee attempts to avoid this result, by asserting that "property held pursuant to an execution lien has priority over a subsequently recorded declaration of homestead." (A. O. B. p. 13.) The trustee's assertion is without authority, and does not represent the law in California. In California, there is but one way of constituting a judgment a lien on the debtor's land, and that is the filing of an abstract thereof, in the Office of the Recorder of the County in which the land is situated. The lien of an execution or an attachment does not have this effect. The court so held in *Beaton, et al. v. Reid, et al.*, 11 Cal. 484, 44 Pac. 167 (1896), wherein a judgment creditor had a writ of execution issued and levy made by the Sheriff upon the premises in dispute, and notice of sale under said execution given. Subsequent to the levy, but before the sale, the judgment debtor declared a homestead on the premises, and then brought an action to enjoin the sale. No abstract of judgment had been recorded, and the court stated that

"the levy of the execution in question did not have the effect to prevent the premises from being impressed with the homestead character at any time before the sale; and that, the lien of the execution not being one of those specified in the Civil Code for which the homestead can be taken, the judgment of the court below enjoining the sale and the execution of the deed thereunder was right."

See also:

Yager v. Yager, 7 Cal. 2d 213, 60 P. 2d 422 (1936).

Summary and Conclusion.

From the foregoing, it becomes clear that the real test of whether or not property is exempt under Section 70a is the following: Had there been no bankruptcy filed, and a homestead declaration recorded, on the date on which said declaration was recorded, could there have been a creditor whose lien would prevail? In *White v. Stump*, *supra*, any creditor who had previously levied on the real property would have prevailed over the homestead declaration and so the exemption was denied. In *Sampsel v. Straub*, *supra*, where the bankrupt held legal title to the property, a creditor who had recorded his abstract of judgment would have prevailed. But in *Myers v. Matley*, *supra*, no creditor would have prevailed, as the homestead declaration took precedence over any prior levy, unless it went all the way to sale, and in that case, the homestead exemption was granted.

Applying that test to the instant case, in California no judgment creditor with an abstract of judgment recorded could have prevailed over a subsequently recorded homestead. The judgment creditor, with abstract recorded, has a lien only on real property to which the debtor holds legal title; where the debtor holds equitable title, the lien is ineffective. When appellee and his wife recorded their declaration of homestead, there were no creditors whose liens could have prevailed over that homestead declaration had there been no bankruptcy. The trustee takes no greater right to reach

exempt property than creditors under the laws of California. If those creditors had no lien on the property and the bankrupt claims an exemption thereon, the trustee has no rights therein.

It is therefore respectfully submitted that the judgment of the United States District Court herein should be affirmed, and that the homestead of appellee herein should be held to be valid and the property exempt.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ADLEY M. SHULMAN

